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No. 97-1032

# In the Supreme Court of the United States

OCTOBER TERM, 1997

MEEHAN SEAWAY SERVICE COMPANY, ET AL.,
PETITIONERS

*v.*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, DEPARTMENT OF LABOR, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

SETH P. WAXMAN
*Solicitor General*
*Department of Justice*
*Washington, D.C.20530-0001*
*(202) 514-2217*

MARVIN KRISLOV
*Deputy Solicitor of Labor*
ALLEN H. FELDMAN
*Associate Solicitor*
MARK S. FLYNN
*Attorney*
*Department of Labor*
*Washington, D.C. 20210*

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioners had adequate notice satisfying due process requirements that a worker's claim under the Longshore and Harbor Workers' Compensation Act was potentially based on a "cumulative trauma" or "aggravation of pre-existing condition," rather than merely on a "specific accident" injury.

2. Whether the court of appeals correctly held that the Benefits Review Board's delay in ruling on petitioners' appeal was not unreasonable and did not violate petitioners' due process rights.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 125 F.3d 1163. The decision and order of the Benefits Review Board (Pet. App. B152-B186) is unreported. The decision of the administrative law judge (Pet. App. B23-B151) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on September 15, 1997. The petition for a writ of certiorari was filed on December 15, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Respondent Robert Hizinski worked as a longshoreman for petitioner Meehan Seaway Service Company (Meehan). Pet. App. A2. On October 14, 1989, at the end of a workday spent carrying 110-pound sacks of grain across the uneven surface of other sacks, Hizinski informed his supervisor that his right knee was hurting. *Ibid.* He underwent knee surgery three months later and has not worked since the surgery. *Id.* at A3.

In February 1990, Hizinski filed a claim under the Longshore and Harbor Workers' Compensation Act (LHWCA or the Act), 33 U.S.C. 901 *et seq.*, for disability benefits arising out of an injury to his right knee that occurred in December 1979 during his employment with American Grain Trimmer. Pet. App. B56. Shortly thereafter, in May 1990, he amended his claim, stating that it was based on both the 1979 injury and on the injury that occurred on October 14, 1989, during his employment with Meehan. *Id.* at A3, B60.

2. After a hearing, the Department of Labor (DOL) administrative law judge (ALJ) issued a decision and order requiring Meehan to pay benefits. The ALJ initially found that Hizinski's 1979 injury was to his left, not his right knee, and thus that American Grain Trimmer was not liable for Hizinski's current claim based on a right knee injury. Pet. App. B77-B86.

Turning to petitioner Meehan's liability, the ALJ determined that Hizinski was entitled to the presumption under Section 920(a) of the LHWCA that his injury was caused by his employment with Meehan and therefore covered by the Act. 33 U.S.C. 920(a). To invoke the presumption, a claimant must show

"the existence of an injury and an accident or a working condition that could have caused the injury." Pet. App. B94 (citing cases).[1] A claimant may "establish his prima facie case if he can show that the working condition exacerbated or aggravated [a pre-existing] condition." *Id.* at B98 (citing cases). Once that prima facie showing is made, the burden shifts to the employer to come forward with substantial evidence that "severs the [presumed] causal connection between the claimant's injury and his employment." *Id.* at B110.

Applying that standard, the ALJ found that, although Hizinski failed to prove his assertion that he had suffered a "specific accident" on October 14, 1989, Hizinski's evidence did support a finding that he suffered from a pre-existing right knee condition that was aggravated on that date, Pet. App. B94-B95, B109 ("claimant's testimony showed that he suffered increased and severe pain on that day while working"), and that Hizinski's working conditions that day, involving the carrying of 110-pound bags, could have been the cause of the aggravation. *Id.* at B104-B105. The ALJ determined that the evidence was sufficient to invoke the Section 920(a) presumption. The ALJ further concluded that Meehan did not submit substantial evidence in rebuttal that would overcome the presumption of a causal nexus between the working conditions at Meehan and the aggravation of Hizinski's knee condition. *Id.* at B110-B111. In particular, the ALJ found that no physician testified that

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[1] Section 920(a) provides that "it shall be presumed, in the absence of substantial evidence to the contrary, * * * [t]hat [a] claim [for compensation] comes within the provisions of this chapter." 33 U.S.C. 920(a).

Hizinski's work on October 14, 1989, did not aggravate his condition, whereas one physician testified that such aggravation did occur. *Id.* at B110.[2]

The ALJ concluded that Hizinski was permanently totally disabled and was therefore entitled to benefits based on an average weekly wage of $186.00. Pet. App. B117-B148.

3. In August 1992, Meehan appealed to the Benefits Review Board.[3] In September 1996, the Board affirmed the ALJ's decision and order.[4] The Board

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[2] The ALJ also held that Hizinski's failure to provide timely formal notice under the 30-day time limit of Section 912(a) of the LHWCA, 33 U.S.C. 912(a), was excused because, under Section 912(d)(2), 33 U.S.C. 912(d)(2), Meehan was not prejudiced by the failure to give such notice. Pet. App. B111-B116. It was not disputed that Hizinski's claim against Meehan was timely under Section 913(a)'s one-year limitation period. See 33 U.S.C. 913(a). There was, however, a dispute about whether Hizinski met the requirements of Section 912 pertaining to a claimant's obligation to provide formal notice to the employer. See 33 U.S.C. 912(a) (requiring notice of injury within 30 days of date of injury or 30 days after claimant is, or should have been, aware of relationship between injury and employment); 33 U.S.C. 912(d) (conditions under which failure to give notice is excused, including where employer or carrier was not prejudiced).

[3] Meehan sought a stay of the ALJ's award of benefits pending appeal, which the Board denied on August 20, 1992. Meehan then appealed the Board's denial of a stay, but the court of appeals, on September 9, 1993, affirmed the denial. *Meehan Seaway Serv. Co.* v. *Director, OWCP*, 4 F.3d 633 (8th Cir. 1993).

[4] Although no attention was directed to the point below, and nothing turns on it, it should be noted that the Benefits Review Board lacked authority to issue the decision on September 12, 1996. The Department of Labor Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-219, provided that in the

rejected Meehan's argument that the ALJ erroneously applied the Section 920(a) presumption to award benefits based on a cumulative trauma that Hizinski had never explicitly asserted. The Board concluded that the presumption was properly invoked because the claimant had shown that he suffered an injury in the form of a torn medial meniscus and that working conditions existed at Meehan on October 14, 1989, that could have caused or aggravated this injury. Pet. App. B160. The Board further held that it was evident from Hizinski's claim and pretrial statement, in conjunction with his hearing and deposition testimony, that his claim encompassed the allegation that his knee condition had been aggravated. *Id.* at B162; see also *id.* at B159 & n.1 (noting that Hizinski's pre-hearing stipulation "reserv[ed] a right to claim a 'Gillette' injury," which the Board understood to be a cumulative trauma). The Board further concluded that the ALJ's finding that Hizinski sustained a work-related injury on October 14, 1989, was supported by substantial evidence. *Id.* at B165.[5]

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absence of action by the Board *before* September 12, 1996, any ALJ decision pending before the Board for more than one year would be "considered affirmed by the * * * Board on that date, and * * * considered the final order of the Board for purposes of obtaining [judicial] review." Because the Board did not issue a decision *before* September 12, the ALJ's decision became, by virtue of the Appropriations Act, the final order of the Board. Nonetheless, because the Board purported to do what the Act "considered" it to have done by operation of law (*i.e.*, affirm the ALJ), the case has proceeded in the same manner as envisioned by the Appropriations Act, and we describe the Board's decision as pertinent background in the case.

[5] The Board also upheld the ALJ's ruling that Meehan was not prejudiced by Hizinski's failure to provide timely formal notice of his claim pursuant to 33 U.S.C. 912(a). The Board

4. The court of appeals affirmed the Board's decision, rejecting Meehan's argument that the ALJ had violated its due process rights by basing its decision on a theory that Hizinski did not assert—namely, that his claim was for "cumulative trauma or aggravation of pre-existing injury," rather than for a specific trauma occurring on October 14, 1989. The court reasoned that Hizinski's complaint "notified Meehan that he had received an injury to his right knee which he claimed was related to his employment," and that his pretrial stipulation preserved his right to claim that his knee injury was in the nature of a *Gillette* injury (*i.e.*, a cumulative injury of the nature addressed in a decision under state law of that name) or occupational disease. In addition, three months before the hearing, Hizinski notified DOL and the claim representative for Meehan's insurer that Hizinski's work at Meehan had temporarily aggravated his knee condition. Pet. App. A9. The court concluded that Meehan was thereby "put on notice prior to the hearing date that there was uncertainty as to the nature of Hizinski's injury with a possibility of cumulative trauma," and that Meehan was not prejudiced by any lack of specificity regarding the nature of Hizinski's injury. *Id.* at A10.

The court of appeals also rejected Meehan's arguments that (1) Hizinski was not entitled to invoke the Section 920(a) presumption "because he did not elect to proceed under a theory of cumulative trauma and

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affirmed the ALJ's finding that Meehan had failed to show that it was unable to investigate the claim effectively due to the late notice. Pet. App. B168. The Board also upheld the ALJ's calculation of claimant's average weekly wage and the ALJ's finding that there was no suitable alternate employment available to claimant. *Id.* at B169-B178.

he did not present testimony of a degenerative condition," and (2) even if he was entitled to the presumption, the ALJ erred in finding that the presumption was not rebutted. Pet. App. A12. As to Meehan's first argument, the court reiterated its finding that Hizinski did make a "sufficient claim for a degenerative condition or cumulative trauma and there was substantial evidence to support the finding of the ALJ." *Ibid.* As to Meehan's second argument, the court upheld the ALJ's finding that Meehan had not rebutted the Section 920(a) presumption as supported by substantial evidence, explaining that "[t]he credibility determinations and considerations of the ALJ as to the weight of the evidence are not for our review." *Id.* at A13.[6]

Finally, the court of appeals held that the four-year delay of the Benefits Review Board in ruling on Meehan's appeal of the ALJ's decision did not violate Meehan's due process rights. Although it acknowledged that "[a]t some point a delay in the opportunity for administrative and judicial review can amount to a denial of due process," Pet. App. A22, the court concluded that the delay in this case was not unreasonable for two reasons: (1) the delay was due in part to Meehan's unsuccessful prior appeal to the court of appeals of the Board's denial of a stay;[7] and (2) the delay was also partially attributable to a loss of case records during their transmission, and the need to reconstruct those records. *Ibid.*

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[6] The court of appeals also upheld the ALJ's calculation of Hizinski's average weekly wage and the ALJ's finding that Hizinski was permanently totally disabled. Pet. App. A14-A21. Petitioners do not seek review of these rulings.

[7] See note 3, *supra*.

## ARGUMENT

The court of appeals held that petitioners' due process rights were not violated because (1) respondent gave Meehan adequate notice of the nature of his claim for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*; and (2) the Benefits Review Board did not engage in unreasonable delay in issuing a decision affirming the award of benefits. Those fact-bound rulings do not conflict with any decision of this Court or another court of appeals or warrant review by this Court.

1. Petitioners assert (Pet. 6-12) that the ALJ violated their due process rights by awarding LHWCA benefits based on a theory that respondent did not present or prosecute. In what is essentially a restatement of that argument, but which is presented as a second ground for review, they also contend (Pet. 12-17) that the ALJ violated their due process rights by employing the Section 920(a) presumption "to award benefits on a theory of recovery never prosecuted by [c]laimant." Pet. i. In support of those arguments, petitioners assert that the ALJ awarded benefits to Hizinski based on a cumulative trauma theory despite the fact that Hizinski alleged only that he suffered a specific traumatic accident.[8]

Contrary to petitioners' claim, both the court of appeals and the Benefits Review Board correctly concluded that Hizinski did give adequate notice of the nature of his claim. Although the ALJ found that claimant's allegation of the occurrence of a specific

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[8] Petitioners do not dispute that Hizinski's injury is of a type cognizable under the Act; they assert only that they had inadequate notice of the nature of the claim of injury.

accident (*i.e.*, stepping into a hole between two grain sacks) was not supported by the evidence, see Pet. App. B97, the ALJ found that the evidence did support his claim of a "second injury" or "reinjur[y]" occurring on that date. *Id.* at B106-B107. In affirming the ALJ's decision, both the Board and the court of appeals rejected petitioners' arguments that they were not adequately notified of the "reinjury" theory. The Board found it "evident from claimant's hearing and deposition testimony alleging re-injury that a claim for aggravation was being made." *Id.* at B162 (citations omitted). The court of appeals further stated that, in addition to alleging an injury related to his Meehan employment, claimant "filed a Pretrial Stipulation in which he provided notice to Meehan that he wished to reserve the right to claim that his knee injury was in the nature of a 'Gillette' injury or occupational disease." *Id.* at A9. The court concluded that that stipulation, along with other evidence proffered by Hizinski before and during the hearing, was sufficient to put Meehan on notice of the "possibility of cumulative trauma. " *Id.* at A10. In any event, the question of whether the court of appeals and the Board were correct in their view that the record in this case shows that Hizinski gave adequate notice of the nature of his claim and that petitioners were not prejudiced by the lack of specificity of the notice is a narrow, fact-specific issue that does not warrant consideration by this Court.

Petitioners' reliance (Pet. 10-11) on *U.S. Industries/Federal Sheet Metal, Inc.* v. *Director, OWCP*, 455 U.S. 608 (1982), is misplaced. In that case, an LHWCA claimant alleged that he had suffered an injury at work on a particular workday, but the ALJ concluded that no such injury occurred and denied

benefits. *Id.* at 616. The court of appeals reversed on the theory that the claimant had suffered an injury at home when he awoke in pain the following morning, and determined that the claimant was entitled to the Section 920(a) presumption that the injury was "employment-bred." *Id.* at 612. This Court reversed, holding that the claimant had not claimed such an injury and that the Section 920(a) "presumption did not require [the ALJ] to adjudicate any claim that was not made." *Id.* at 616. This case is quite different, inasmuch as both the Board and the court of appeals concluded that Hizinski did assert an alternative cumulative trauma theory before the ALJ, and the ALJ expressly found that such an injury (aggravation of his knee condition) occurred.

2. Petitioners also argue (Pet. 17-20) that their due process rights were violated by the Benefits Review Board because the Board unreasonably delayed in issuing a decision on their appeal of the ALJ's decision. The court of appeals held, however, that the Board's delay in processing this case was not unreasonable, and was explained in part by petitioners' appeal of the Board's decision denying a stay and by the Board's need to reconstruct case records that were lost in transmission. Pet. App. A22. The question of the reasonableness of the Board's delay under the circumstances of this case is not worthy of this Court's review. Moreover, even if there had been unreasonable delay on the part of the Board, the usual relief granted in such a situation is a mandamus order requiring the agency to act. Cf. *Telecommunications Research & Action Ctr.* v. *FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) (relief for unreasonable agency delay is mandamus order requiring agency to act). Since the

Board has already issued a decision in this case, it is not clear what relief petitioners seek for past delay.

In any event, Congress has now spoken to the issue of Board delay in the Department of Labor Appropriations Acts of 1996, Pub. L. No. 104-134, 110 Stat. 1321-219, which provides in pertinent part that, beginning September 13, 1996, the Board shall make a decision in LHWCA cases within one year after an appeal to it has been filed and, if it fails to do so, the decision under review shall be considered the final order of the Board for purposes of obtaining court of appeals review. See also Department of Labor Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-241 (continuing one-year limit on pendency of appeals to Board); Department of Labor Appropriations Act of 1998, Pub. L. No. 105-78, 111 Stat. 1476 (same). Thus, under the current scheme, delays of the magnitude in this case will not occur. This Court's review of the question of what constitutes unreasonable Board delay would therefore serve little useful purpose with regard to the Board's current processing of cases.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
*Solicitor General*

MARVIN KRISLOV
*Deputy Solicitor of Labor*

ALLEN H. FELDMAN
*Associate Solicitor*

MARK S. FLYNN
*Attorney*
*Department of Labor*

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